

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

FEB 05 2020

MARSHALL JUSTICE :
 :
 v. : Docket No. WEVA 2018-48-D
 :
 ROCKWELL MINING, LLC :

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

SUA SPONTE DIRECTION FOR REVIEW AND BRIEFING ORDER

BY: Rajkovich, Chairman; Young and Althen, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). Pursuant to section 113(d)(2)(B) of the Mine Act, 30 U.S.C. § 823(d)(2)(B), and Commission Procedural Rule 71, 29 C.F.R. § 2700.71, the Commission on its own motion directs review of the January 6, 2020 decision of the Judge in the above-captioned case on the ground it may be contrary to law or Commission policy and presents a novel policy question. Specifically, the Judge noted that the Commission has not settled on the legal test for assessing claims of interference filed under section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1). Slip op. at 9. The review of the decision is limited to the appropriate standard of proof for such claims.¹

The Commission has received briefs on this issue in a number of prior cases, and has the briefs filed in *Monongalia County Coal Co. v. FMSHRC*, No. 18-1196, *voluntarily dismissed*, 2020 WL 282907 (D.C. Cir. Jan. 17, 2020). Therefore, the parties are not required to file briefs

¹ Our dissenting colleague does not find a basis for this review. On the contrary, the Mine Act expressly grants the Commission the authority to review cases upon the ground that “the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented.” 30 U.S.C. § 823(d)(2)(B). Congress clearly gave the Commission the statutory authority to clarify policies of legal interpretation set forth in Administrative Law Judges’ decisions that are irreconcilable, cause confusion and waste for the parties and Judges alike through lack of clarity, and delay the outcome of section 105(c) proceedings. In the absence of either party seeking review, by its terms the Mine Act grants us the authority to “remand . . . , affirm, set aside, or modify” the result in the case after resolving the identified legal or policy issue — here the necessary and proper standard for review. 30 U.S.C. § 823(d)(2)(B)&(C).

but may do so within forty (40) days of the date of this Order. The Commission will not accept reply briefs.

Because of public interest in this matter, the Commission will consider motions to intervene or to file amicus briefs that accompany briefs from interested parties. All such motions and briefs must be filed within forty (40) days of the date of this order. This order is also being sent to the parties who filed briefs in the referenced court proceeding.



Marco M. Rajkovich, Jr., Chairman



Michael G. Young, Commissioner



William I. Althen, Commissioner

Commissioner Jordan, dissenting:

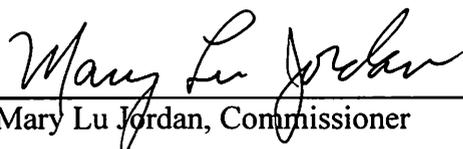
I dissent from the sua sponte grant of review in this matter. This case involves a miner's complaints of discrimination and interference, which the Judge dismissed. The grant of review, however, does not involve any inquiry as to whether the Judge's dismissal was correct. Rather, review is limited to "the appropriate standard of proof for such claims." Thus the majority is reaching out to simply opine on a legal issue in a case instead of deciding its ultimate outcome – that is, whether the Judge properly found no discrimination or interference.

The Commission's decision in this case will have no real-world consequences for either of the parties. It is a theoretical undertaking devoid of any practical effect on the litigants here. Moreover, the decision that ultimately issues will necessarily exceed the scope of our authority under the Mine Act, which states that the Commission may either "remand the case to the administrative law judge for further proceedings as it may direct or it may affirm, set aside, or modify the decision or order of the administrative law judge in conformity with the record." 30 U.S.C. § 823(d)(2)(iii)(C). That will not happen here, where the scope of the grant of review is limited to a discussion about a legal standard, depriving us of the authority to rule on the ultimate decision of the administrative law judge.

The majority's grant of review of an isolated legal issue will necessarily result in the issuance of an advisory opinion. In so doing, my colleagues contravene the well-established principle that we do not issue such opinions. For example, in *Wade Sand & Gravel Co.*, 37 FMSHRC 1874, 1877-78 (Sept. 2015), we refused to consider the validity of the Secretary's regulatory interpretation because "to do so would constitute an advisory opinion, a type of decision that the Commission, like the federal courts, does not issue." See also *Oak Grove Res., LLC*, 36 FMSHRC 2411 (Sept. 2014) (stating that review of the Judge's order articulating the standard for establishing a repeated flagrant violation would amount to "an advisory opinion on an abstract legal principle").

The majority's grant of sua sponte review is particularly ironic here, because for each of the three alleged claims of interference, the Judge meticulously applied both of the tests that various Commissioners have adopted in prior cases and found no interference under either of them. Hence I would be hard-pressed to say that his decision may be contrary to law because he might not have utilized the proper standard for reviewing interference claims. In fact, he painstakingly applied the two and only tests the Commission has articulated for interference. How could he have applied the wrong standard if he used both of them?

This case should not be used as a vehicle to opine on a legal standard in a vacuum. Articulating a test for interference in a decision where it will not be applied to the facts in the record is an academic exercise in which we should not participate.


Mary Lu Jordan, Commissioner

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